Cempaka Finance Bhd v Abbas bin Yaakob

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2-24-58 OF 1998
KAMALANATHAN RATNAM J
26 FEBRUARY 1999

Land Law *— Charge — Notice of demand — Whether notice of demand complied with terms of annexure to the charge — Whether application to sell land based on faulty notice of demand must be dismissed*

The defendant charged his land to the plaintiff in order to obtain a loan facility together with interests at 2% pa. Clause 8(1)(a) of the annexure to the charge dealt with the right of the chargee in the event of default in payment of instalment whereas cl 8(1)(b) dealt with event of default to make payment of the balance sum. Upon the defendant's failure to repay the loan, the plaintiff filed an application to sell the land by way of a public auction. In its notice of demand, the plaintiff demanded that the sum owed, together with interests, be paid within 14 days from the date of the notice. The defendant submitted that the notice of demand had relied on cl 8(1)(b) of the annexure, and therefore should be dismissed as the defendant had in fact been paying the instalments. It was the defendant's contention that the demand should be made pursuant to cl 8(1)(a) of the annexure. The plaintiff, on the other hand, contended that its claim was not based on cl 8(1)(b) but was based on cl 8(1)(a).

Held, dismissing the application:

The notice of demand did not show the exact breach that caused the said notice to be sent. In the absence of any clear mention of a default in payment of instalments, the notice of demand must have been sent pursuant to cl 8(1)(b) of the annexure, since cl 8(1)(a) referred to a notice of demand requiring payment within seven days from the date thereof (see p 414F–H).

In the circumstances, since a proper demand is a pre-requisite to the plaintiff's right to enforce its claim and since the notice of demand did not comply with the terms of the annexure, the application which was premised on that faulty notice of demand must be dismissed (see p 415H–I).

[Bahasa Malaysia summary

Defendan telah menggadaikan tanahnya kepada plaintif bagi memperolehi kemudahan pinjaman bersama-sama faedah pada kadar 2% setahun. Fasal 8(1)(a) lampiran kepada gadaian tersebut berurusan dengan hak pemegang gadaian sekiranya berlaku keingkaran pembayaran ansuran sedangkan fasal 8(1)(b) berurusan dengan peristiwa keingkaran untuk membuat pembayaran jumlah

baki. Di atas kegagalan defendan untuk membayar balik pinjaman tersebut, plaintif telah memfailkan satu permohonan untuk menjual tanah tersebut melalui perlelongan awam. Dalam notis tuntutannya, plaintif menuntut supaya jumlah yang terhutang, bersama-sama faedah, hendaklah dibayar dalam tempoh 14 hari dari tarikh notis tersebut. Defendan berhujah bahawa notis tuntutan tersebut telah bergantung pada fasal 8(1)(b) lampiran tersebut, dan dengan itu haruslah ditolak kerana defendan pada hakikatnya telah membuat pembayaran bagi ansuran-ansuran tersebut. Ianya merupakan penegasan defendan bahawa tuntutan tersebut seharusnya dibuat selaras dengan fasal 8(1)(a) lampiran tersebut. Plaintif, sebaliknya, menegaskan bahawa tuntutannya tidak berasaskan pada fasal 8(1)(b) tetapi berasaskan pada fasal 8(1)(a).

Diputuskan, menolak permohonan:

Notis tuntutan tersebut tidak menunjukkan keingkaran sebenarnya yang menyebabkan notis tersebut dikirimkan. Dalam ketiadaan sebarang sebutan nyata mengenai keingkaran pembayaran ansuran-ansuran, notis tuntutan pastinya telah dikirimkan selaras dengan fasal 8(1)(b) lampiran tersebut, oleh kerana fasal 8(1)(a) merujuk kepada notis tuntutan yang memerlukan pembayaran dalam tempuh tujuh hari dari tarikhnya (lihat ms 414F–H).

Dalam keadaan tersebut, oleh kerana satu tuntutan yang sempurna merupakan syarat terdahulu kepada hak plaintif untuk menguatkuasakan tuntutannya dan oleh kerana notis tuntutan tersebut tidak mematuhi terma-terma lampiran tersebut, permohonan yang berasaskan pada notis tuntutan yang tidak sempurna itu mestilah ditolak (lihat ms 415H–I).

Notes

For cases on notice of demand, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1457–1470.

Nadrah Mohamad (*Shatar, Tan & Chee*) for the plaintiff.
Cherian Kuruvila (*Feroz & Co*) for the defendant.

Kamalanathan Ratnam J: This is an application by the plaintiff to sell, by way of a public auction, the land registered in the name of the defendant and charged to the plaintiff. The defendant charged the said land to the plaintiff in order to obtain a loan facility of RM800,000, together with interests at 2% pa above the base lending rate ('the BLR'). Upon the defendant failing to repay the loan, the plaintiff launched this application.

On instructions, the plaintiff's solicitors sent their notice of demand to the defendant dated 14 October 1997. It is necessary to reproduce the full text of the said letter which is exh CHC–2, annexed to the plaintiff's affidavit in support of this application and which reads as follows:

14 October 1997
Abbas bin Yaacob
No 50, Persiaran Duta
50480 Kuala Lumpur

Registered
Certificate of Posting

Dear Sir(s),

Re: Fixed loan facility of RM800,000 granted to you by Cempaka Finance Bhd

We act for Cempaka Finance Bhd of Podium Floor, Wisma TAS, 21, Jalan Melaka, 50100 Kuala Lumpur, who had, upon your application, granted the above fixed loan facility to you.

We are instructed to refer you to the charge executed by you under Presentation No 11008/94 of the property held under Pajakan Negeri 4863, Lot 48681, in the Mukim of Kuala Lumpur, of which you are the registered proprietor, to secure the repayment of all sums of money due or owing by you under the fixed loan facility up to the aggregate principal sum of RM800,000 together with interests thereon and other charges and expenses.

Our client instructs us that you are indebted to our client in the sum of RM536,846.88, as at 30 September 1997, together with interests accruing thereon at the rate of 2% pa above our client's base lending rate (which as at 1 August 1997 is 11.45% pa) on monthly rests and additional interests accruing on the overdue monthly instalments at the rate of 1% pa calculated on daily basis from 1 October 1997, until the date of full settlement.

On our client's instructions, we hereby demand from you payment of the said sum of RM536,846.88 owing to our client under the said charge together with the interests accruing thereon within 14 days from the date hereof, failing which our client will proceed under the provisions of the National Land Code 1965, with a view to having the said property sold to satisfy the debt owing to them.

Yours faithfully,

Sgd

cc Cempaka Finance Bhd
Wisma TAS, Kuala Lumpur
Ref: FL 0981/94

It is also pertinent for the disposal of this matter to refer to cl 8(1)(a) and (b) of the annexure to the charge which deals with 'Events of default':

Events of default

In the event that the chargor(s) (or where the chargor(s) shall be more than one person if any one of them) shall —

(a) make default in payment of any one or more of the instalments or any interests thereon or other sums of moneys (whether principal or interest) herein agreed or covenanted by the chargor(s) to be paid; or

(b) fail to make payment of the balance of the moneys owing to the chargee after the expiration of the notice of demand herein referred to; or ...

then and in any of such cases the principal sum or the balance thereof remaining unpaid and any interests thereon and all other sums or moneys (whether principal or interest) for the time being owing under this charge shall immediately become due and payable by the

chargor(s) to the chargee and the chargee shall forthwith become entitled to recover the same together with interests thereon at the prescribed rate or at such other rate as the chargee may stipulate from time to time at their absolute discretion and to exercise the rights and powers upon default herein contained in this charge and by law provided. Any demand for payment of the moneys intended to be hereby secured may be made by a notice in writing requiring payment within seven days from the date thereof.

Case for the defence

The defendant argued that the notice dated 14 October 1997, was couched in terms to reflect reliance on cl 8(1)(b) of the annexure. Since it was a demand for the payment of balance due after the expiration of the 14 days stipulated in the notice of demand, the defendant argued that the plaintiff's claim must be dismissed since the defendant had, in fact, been paying instalments and had indeed asked for a breakdown of the amounts paid and the number of instalments the defendant was in arrears of, and in the circumstances, it was the defendant's contention, that the demand ought to have been made pursuant to cl 8(1)(a) of the annexure which requires the notice of demand to stipulate a seven day payment period.

Case for the plaintiff

The plaintiff contended that its claim was not based on cl 8(1)(b) but was based on cl 8(1)(a).

Findings of the court

A study of the notice of demand, exh CHC–2, does not show the exact breach that caused the said notice to be sent. Since the plaintiff contends that it is relying on cl 8(1)(a), then all the more was it necessary for the said notice to have stipulated that the demand was made due to default in payment of the said number of instalments with interests thereon, which the chargor had agreed to pay. This becomes all the more onerous on the part of the plaintiff when there is no evidence that it had sent any previous notices of demand specifying the number of instalments remaining unpaid.

It is my judgment that in the absence of any clear mention of a default in payment of instalments, then, the said notice of demand must have been sent pursuant to cl 8(1)(b) of the annexure.

Mr Kuruvila, for the defendant, argued that once it has been proved that the plaintiff had relied on cl 8(1)(b), then, it becomes necessary for the plaintiff to make a demand pursuant to cl 7 which relates to the 'Chargee's right to demand payment'. The full clause reads as follows:

Chargee's right to demand payment

It is hereby expressly declared that notwithstanding any provision for payment by instalments hereinbefore contained, the chargee may at any time give to the chargor(s) three (3) months previous notice in writing, without assigning any reason thereto, requiring payment of the whole of the moneys then owing to the chargee under this charge, and the chargor(s) will pay such moneys forthwith upon the expiration of such notice and such notice shall be in writing signed by any duly authorized officer of the chargee, and such notice

> shall be deemed to have been sufficiently served on the chargor(s) if it is left at the chargor's usual or last known place of residence within Malaysia or at any one of the chargor(s) usual and last known places of business or sent by prepaid ordinary post to either of such addresses, and in the last mentioned case, service shall be deemed to be made at the time when the prepaid ordinary post would, in the ordinary course be, delivered.

To my mind, the defendant's argument that the plaintiff ought to have made a demand pursuant to cl 7 and thereby ought to have given three months previous notice is, unmeritorious. Clause 7 is a blanket clause which entitles the plaintiff to demand payment of the entire balance due and outstanding to the plaintiff without giving any reasons for such demand, so long as the three months previous notice in writing had been given.

What the plaintiff did in this case was to claim the full balance due together with interests accruing therein at 2% above the BLR as in the agreement, and this is what the plaintiff has claimed pursuant to cl 8(1)(b). However, the plaintiff has also, in the notice of demand (exh CHC–2), claimed an additional interests accruing on the overdue monthly instalments at the rate of 1% pa, calculated on daily basis from 1 October 1997, until settlement.

This no doubt has been included pursuant to cl 8(ii) which reads as follows:

> It is also expressly and mutually agreed that should the chargor(s) default for whatever reason in the payment of any one or more of the monthly instalments as hereinafter provided, whether of the principal sum and interest or interests after seven days from the due date as hereinafter stipulated, the chargee shall be at liberty at its absolute discretion to impose, and the chargor(s) shall pay a further interests thereon at the rate of 1% pa, calculated on a daily basis or at such rate as the chargee shall from time to time specify on such unpaid instalment or instalments from the date of such default until they are fully paid without prejudice to any other rights of the chargee as hereinafter contained.

Now, to be able to rely on cl 8(ii), and thus be able to claim for the additional 1% interest, the notice of demand ought to have stipulated that payment ought to have been made within seven days and not 14 days as was stated in exh CHC–2. Therefore, the demand for the additional interests is to be based after expiry of 14 days, and not seven days as was stipulated in the annexure. Whilst it can be argued for the plaintiff that in fact the defendant is benefiting by a later demand, I cannot ignore the intention of parties who had wilfully entered into a bargain that the demand ought to be fulfilled after seven days and not any other number of days arbitrarily stipulated.

In the circumstances, since a proper demand is a pre-requisite to the plaintiff's right to enforce its claim, and since I have held that the notice of demand did not comply with the terms of the annexure, and since this application is premised on that faulty letter of demand, I am therefore compelled to dismiss this application with costs.

Application dismissed.

Reported by Jafisah Jaafar